

**DEQ OFFSHORE/COASTAL WIND ENERGY
REGULATORY ADVISORY PANEL
(OFFSHORE RAP)**

**DRAFT MEETING NOTES
RAP MEETING – THURSDAY, JULY 29, 2010
DEQ PIEDMONT REGIONAL OFFICE TRAINING ROOM**

Meeting Attendees

<i>RAP Members</i>	<i>Interested Public</i>	<i>DEQ Staff</i>
James Casey – U.S. Navy	Ruth Boettcher - DGIF	Cindy Berndt
Guy Chapman – Dominion (Alternate for Bob Bisha – Dominion)	John Evans – Army Corps	Russell Deppe
John Daniel – Troutman Sanders/Invenegy	Stephanie Gardner - PEC	Chris Egghart
Ray Fernald – DGIF	Don Giecek - Invenergy	Deb Miller
Dan Holmes - PEC	Patsy Kerr – USFF Navy (Alternate for James Casey – U.S. Navy)	Bill Norris
Ken Jurman - DMME	Ivy Main – Sierra Club	Jennifer Perkins
Roger Kirchen - DHR	Laura McKay – DEQ (Alternate for James Golden/Rick Weeks)	Carol Wampler
Larry Land – VACO	Elizabeth Murphy - VMRC	
Bob Matthias – Virginia Offshore Wind Coalition	Rick Thomas – Timmons Group	
Jonathan Miles – VA Center for Wind Energy at JMU	David Groberg, Invenergy	
Thomas Numbers - ERM	Theo deWolff, Seawind	
Nikki Rovner - TNC		
Chandler Smith – PBS&J		
Tom Smith – DCR		
Mark Swingle – Virginia Aquarium & Marine Science Center		
Lyles Varnell - VIMS		
Stephen Versen - VDACS		
Tony Watkinson - VMRC		
Bryan Watts – Center for Conservation Biology, William & Mary/VCU		

NOTE: The following Offshore RAP Members were absent from the meeting: Bob Bisha – Dominion; James Golden – DEQ; Chelsea Harnish – Chesapeake Climate Action Network; Ron Jefferson – Appalachian Power; Larry Lombardi – City of Norfolk; Marina Phillips – Kaufman & Canoles

1. Welcome & Introductions (Carol Wampler):

Carol Wampler, RAP Leader and Meeting Facilitator, welcomed all of the meeting participants and asked for those attending today's meeting to briefly introduce themselves.

2. Review of Issues (Carol Wampler):

Carol Wampler provided an overview of DEQ's Renewable Energy Permit by Rule process and provided an outline of the issues that need to be addressed by the members of the Regulatory Advisory Panel. Her overview included the following information:

- Statutory Goals for DEQ's Renewable Energy Permit by Rule:
 - Promote renewable energy – provide certainty, timeliness, reasonable regulatory requirements (*The PBR process is a streamlined permitting format. – We are looking to develop a regulation that is enforceable.*)
 - Protect natural resources – provide enforceable standards that are protective of wildlife & historic resources at/near project site.
- A Permit by Rule (PBR) is:
 - Expedited permitting process used by DEQ for certain solid waste facilities (*The PBR was originally used in the waste division to address “transfer stations” and similar facilities. We have inherited that process for the renewable energy permitting regulation.*)
 - Regulation stating “up front” the criteria that applicant must meet (*Regulation says upfront everything that needs to be done. DEQ has a packet with checklists when using a PBR.*)
 - Requirement that applicant submit documentation/certification that has met requirements
 - For Renewable Energy Projects, requirement that DEQ review submission for completeness & adherence to regulation, in consultation with sister agencies (*The requirement for the review for completeness and adherence to the regulation to be done in consultation with DEQ's sister agencies is a unique feature of this PBR. For solid waste PBR's, completeness alone leads to permit coverage.*)
 - If complete, then DEQ notifies that project is authorized under the PBR
- A Permit by Rule is NOT:
 - An individual permit
 - Site-specific
 - Based on a case-by-case technical analysis
- PBR Criteria found in DEQ's enabling legislation for Small Renewable Energy Projects – 10.1-1197.6.B
 - Notice of Intent
 - Local-government certification (aka siting decision) (*The original Wind RAP, with OAG guidance, discussed the fact that siting decisions are not part of the purview of this PBR. Siting (via zoning, special use permits, and other land use decisions) remains a local government responsibility for renewable energy projects. Siting of a facility offshore in State Waters may the responsibility of VMRC; it is not DEQ's.*)
 - Interconnection studies
 - Final interconnection agreement
 - PE certification of generation capacity
 - Analysis of impacts of NAAQS
 - Analysis of impact on natural resources
 - Determination of likely significant adverse impacts; mitigation plan

(Analysis, determination of likely significant adverse impact, and mitigation are the chief operational statutory requirements for DEQ to administer.)

- PE certification of design
- Operating plan re mitigation
- Site Plan re mitigation
(In the solid waste PBR, DEQ generally just checks off that the applicant has submitted each required component of the PBR application, as prescribed by regulation. For many of the application requirements for the renewable energy PBR, DEQ will do likewise. With respect to the operating plan and site plan, however, DEQ may evaluate the sufficiency of aspects of those plans if they relate to a required mitigation plan (e.g., curtailment of operations to reduce bat fatalities)).
- Certification re environmental permits (requirements to obtain other permits are NOT abrogated by PBR)
- Public meeting
- Public comment period
- Chief PBR Operating Provisions for DEQ
 - Analysis – Wildlife/Historic Resources/Other
 - Significant Impact? – Wildlife/Historic Resources only
 - Mitigation & Monitoring – Wildlife/Historic Resources only
- After long deliberations...the original Wind RAP AGREED on all but 3 issues – Some of these issues will have implications for the Offshore/Coastal Wind RAP. Those 3 issues include:
 - What exemption/notice requirement should apply for projects 5 MW and less (sometimes referred to as de minimis)? *(Are there any small projects –projects of 5 MW or less- that don't need to go through the PBR process, except for notice and local government certification? Can we reach consensus?)*
 - What wildlife – other than bats – should constitute a mandatory trigger for mitigation (SGCN?)? *(Do we need to go beyond bats in identifying other SGCN that would trigger certain required actions?)*
 - What avian field studies should be done in coastal zone?
- **#1 – “De Minimis”** – Offshore RAP may touch on this issue if members believe there is a possibility of reaching consensus.
- **#2 – Species of Greatest Conservation Need (SGCN) and Similar Issues** – Determination in SGCN matter is likely to affect Offshore RAP's work, if only indirectly.
- DEQ's Decision regarding Species of Greatest Conservation Need in original Wind PBR
 - Impacts on bats, birds, and T&E species were already recommended to have regulatory status – i.e., mitigation required & enforced. *(A suggestion was made that this statement should read “Impacts on bats; T&E species; and T&E birds...” Birds as unto themselves are NOT afforded special protection, except for T&E birds.)*
 - SGCN species (other than bats & birds) are not affected uniquely by wind projects, so not elevated to regulatory status.
- “Paylor Principle” – We should not make it more difficult to permit a renewable-energy facility than to permit other types of development, unless there is a very good reason (e.g., wind turbines' impact on bats – a special, unique impact). *(This is a policy call by DEQ.)*
- When applying the “Paylor Principle”:
 - Do coastal or offshore wind projects present a unique or special threat to natural resources (wildlife and historic resources)?

- If NOT, are substantive PBR protections needed or warranted?
- If SO, what PBR protections are needed?
- **#3 – Coastal Avian Field Studies** – This is one of the Offshore/Coastal RAP’s Issues to address on today’s agenda. *(The original RAP could not reach consensus on a requirement for avian field studies in the coastal areas. The issue arose in mid-December of 2009, and there was insufficient time to resolve it. The RAP got as far as a desktop study requirement but did not get certain enough information to include a requirement for a field study. That issue was deferred to the Offshore/Coastal Wind RAP.)*
- **Another threshold question:** Are we focusing on construction & operation? (as opposed to siting &/or decommissioning). Consistent with legal advice interpreting our enabling legislation, the original RAP concluded that the PBR must address construction and operation; however, siting and decommissioning authority lies with others, most likely local government.
- There are NO “bad guys” in our RAP discussions. Everyone is trying to do something good for energy and the environment.

Carol noted that she views her role as being an advocate to the DEQ Director, the administration and the public for any recommendation that comes from the group where there is consensus. On issues where the RAP cannot reach consensus, she will explain to these entities any differing opinions and positions. Therefore, the RAP has the greatest chance of seeing its recommendations approved and carried forward into the final proposed regulation if consensus can be reached.

The questions that have to be answered in relation to the PBR being developed are:

- Are we doing enough?
- Are we doing too much?
- Is it reasonable to ask an applicant to do certain things (e.g., radar studies for birds may be extremely expensive but yield uncertain results)?

Carol noted that for the purposes of this RAP that consensus means:

- Can “live with” the resulting regulation.
She urged RAP members to consider this question for the entity of which they are a representative and for other similarly-situated stakeholders.

Will not oppose the provision in other venues (e.g., public comment on the proposal)

3. Review of Principles of Statutory Construction (Nikki Rovner):

Nikki Rovner provided a review of the principles of statutory construction to the group. Her comments included the following:

- What we are talking about is “what the statute means.”
- We need to look at the statute the way a judge would look at it.
- We should NOT try to reframe it to try to figure out what the people who wrote it meant.
- A judge is not going to look at legislative history. We can’t consider legislative history. Virginia does not have a legislative history provision.

- The General Assembly does not normally include reasons why a given statute is written the way it is.
- The statute is supposed to speak for itself.
- We have to confine ourselves to what it says; how it reads.
- Rules to consider include:
 - All words have specific meanings.
 - Have to assume that the drafters intended for each word to have a specific meaning.
 - Assumption is that a statute changes the law. The law is intended to be changed by a piece of legislation.
- Need to look at the plain meaning of each word.
- A PBR in the statute might be considered a “term-of-art” and may not necessarily have a clear meaning.
- There a lot of provisions in the PBR that the original RAP developed that mirror the solid waste rule.
- In the world of legislative drafting, “plagiarism” is a good thing. It is an important tool. If there is something out there that is similar, then use it as your model. Judges and people will know what it means because they have seen it before.
- A statute is assumed to be internally consistent. Each term/word used has the same meaning throughout the statute.
- The statute for renewable energy lists 14 items that are included. This doesn’t mean that it meant to include others. Only those 14 items are included. The express mention of a list of things means that those are included to the exclusion of any others.
- Courts will usually defer to an agency’s reasonable interpretation of a statute.
- Really hard to determine what the writers meant. Need to try to confine ourselves to the wording of the statute and not try to read the minds of the drafters of the statute.
- The words on the page are the important things.

Discussions related to this presentation included the following:

- Each piece of legislation is assumed to change the law.
- The General Assembly made the changes to the law to make it easier not harder than previous law by taking the responsibilities for these activities from the SCC to DEQ.
- It was suggested that this interpretation and the “Paylor Principle” could be considered as a “reasonable administrative interpretation of the statute,” but it is too far to say that it is the only way to interpret statute.
- It was noted that specific requirements and wording tend to trump general wording/concepts. This PBR statute contains specific instructions to DEQ to consult with “sister agencies” regarding sufficiency after DEQ has received a complete application. Even though the only PBR in existence when the statute was enacted (that is, the solid waste PBR) does not involve any more than DEQ’s determination of application “completeness,” this specific directive found in the PBR statute can be fairly interpreted to supercede the general process of the waste PBR.
- Need to look at the statute and determine whether this is or is not what the statute tells us to do.
- What matters is what is written and what is an appropriate interpretation. Need to look at the statute and the wording as a judge would.
- It was noted that at least in the Chesapeake Bay Preservation Act legislation, the General

Assembly did include a policy statement in the statute. The Virginia Energy Statement/Policy also includes a policy statement. The renewable energy PBR statute, however, does not contain any such statement.

4. RAP Discussions of “Straw Man” Historic Resources PBR Provisions (Roger Kirchen, DHR – Facilitated by Carol Wampler)

Roger Kirchen with the Virginia Department of Historic Resources provided an overview of the Historic Resources PBR Provisions “Straw Man” provisions. DHR staff had revised these provisions in view of the RAP’s discussion at the July 7 RAP meeting. This overview and the resulting RAP discussions included the following:

- The “straw man” document before the RAP is the wording of the text of the onshore wind regulation currently under review now with additions added for offshore wind projects. Items have been added that are relevant to wind projects in state waters.
- The second issue of context is the scope of the regulation as they refer to offshore winds and how that relates to other laws, such as VMRC’s permitting authority. Underwater resources and submerged resources that would be under the authority of VMRC have been excluded from the provisions of the PBR. In keeping with the recent decisions made by the DEQ and VMRC directors, VMRC will address archaeological resources on state-owned submerged lands for wind projects in state waters.
- It was noted that when dealing with “underwater projects” that not all submerged areas are state-owned bottom lands and therefore are not under the purview of VMRC. Specifically mentioned was submerged land deeded to Newport News that is not state-owned.
- It was noted that VMRC traditionally deals with uses of the waterway and marine fishery resources and traditionally does NOT deal with things that go over the waterways.
- The previous draft of these provisions addressed “terrestrial” impacts as opposed to “submerged” impacts, as a means to help deal with the difference in authority areas between DEQ and VMRC. It was determined by DHR staff that the term “terrestrial” was very hard to define and the decision was made to use the terms “state waters” and “state-owned bottom lands.”
- It was noted that there is also a set of federal regulations (federal oversight) that would consider impacts to historic resources (i.e., through the Army Corps of Engineers).
- The Directors of DEQ and VMRC have worked out an approach to clarify their separate areas of responsibilities and statutory authorities to eliminate areas of overlap.
- Provisions in the draft PBR are less stringent perhaps than what would be required by a federal agency through federal regulations. The PBR model defines the scope of the study. Under the federal scenario, the scope of study would be a negotiated product to define the area of potential impact. It may be correct to say that studies conducted for the Army Corps of Engineers would satisfy the requirements of the PBR, but the inverse may not be true.
- **Definitions:** The proposed DHR provisions recommend the addition of definitions of “state-owned bottomlands” and “state waters” to the draft regulations currently being reviewed. The VMRC authority for “state waters” and “state-owned bottom lands” goes from the mean low water mark to the 3-mile limit.

ACTION ITEM: Staff will develop or utilize definitions of “state waters” and “state-owned

bottom lands” based on those used in existing regulations for consideration by the RAP.

- **9VAC15-40-40.** Analysis of the beneficial and adverse impacts on natural resources:
- **B.1. Compilation of Known Historic Resources** – Proposed to remain the same as the currently-proposed Wind PBR.
- **B.2. Architectural Survey** – Proposed additions to address specifically offshore wind projects include: *For offshore wind energy projects, (i) field survey shall include all architectural resources 50 years of age or older within five (5) miles of the disturbance zone boundary; and (ii) if the project requires permitting by the Virginia Marine Resources Commission under [citation] resources that are fully submerged in state waters are excluded from this requirement, but may be considered under other provisions of law.*
 - For a project offshore within the 3 mile water limit, the 1.5 miles of the disturbance zone field study may not be sufficient. The viewshed from historic resources near the shore is often clear and uninterrupted out to the location of a proposed wind project in state waters. So a limit of 5 miles is being proposed for the field study extent.
 - Also, in guidance it could be clarified that areas within that limit that do not have a view of the project would be excluded from the field survey area. These areas could be excluded on the basis of a topographic study of the area.
 - The rationale for the 5-mile limit is to ensure consideration of those onshore resources within a radius that would have reasonable impact. The intent is to consider only those onshore resources that have a direct view of the project. It was noted that this language was very confusing and needed clarification. This language was added to address concerns raised during a previous meeting about having to survey underwater/submerged architectural survey. These could include “cultural landscapes” (former exposed lands). The real concern is whether the architectural resource is included in the viewshed.
 - There are very few architectural resources that are fully submerged that would normally be surveyed. Sea vessels and ship wrecks are considered as archaeological resources, not architectural. If a resource is completely submerged in state waters and has no portions above the water and had no viewshed, it would fall under the purview of VMRC.
 - It was noted that DHR had no problems with striking the exclusion noted under 2 (ii) but that it was added to address concerns raised in previous meetings about fully submerged architectural resources.
 - The issue is “what resources are we looking at.”
 - It was suggested that the addition of this language is confusing. A suggestion was made that the language proposed in 2(ii) should be deleted, but the additional language for offshore wind energy projects identified as (i) should be retained as new language. A question was raised as to what you gain by moving the survey limit line from 1.5 miles to 5 miles? It was suggested that this provides in those instances where a project at the 3 mile line would result in a survey that would record any possible new resources onshore that might be impacted because the survey wouldn’t get to the shoreline. The PBR in B.1 would capture those known resources within a 5 mile radius. The proposed addition for offshore wind energy projects in B.2 would capture any new resources within that same survey area limit (i.e., would capture

- any unrecorded resource on the immediate shoreline).
- It was suggested that the 5 mile limit is essentially a proxy for the shoreline. It was noted that there was some inconsistency in this language revision for offshore projects, because if a land-based turbine is located on the shoreline, that survey of architectural resources would only be required for a 1.5 mile limit.
- The language as written is difficult to interpret. It was suggested that different language is needed that could speak specifically to the shoreline and immediately adjacent areas of the shoreline. The 5 mile radius would result in different interpretations at different points along the shoreline depending on the shape of the shoreline.
- It was suggested that the required survey area should be limited to the shoreline zone. This could be tied to the mean low water level. It was suggested that the extent of the survey required inland should be limited to 1.5 miles of the shoreline, to be consistent with the “Onshore Wind Energy RAP” recommendations currently being reviewed.
- It was suggested that the wording of this section should be revised to read: “For offshore wind energy projects a field survey shall include all architectural resources 50 years of age or older within five (5) miles of the disturbance zone boundary but not extend more than 1.5 miles inland from the mean low water shoreline.”

CONSENSUS: The members of the RAP agreed with the concept of the use of this revised language related to 1.5 miles inland from the mean low water mark and the concept of a clear unobstructed view to the project as the key survey issue.

- If an architectural resource exists on state-owned bottom lands, VMRC has jurisdiction and therefore the resource would be excluded from the requirements of this PBR.
- A question was raised as to what is the distinction between “an architectural resource” and “an archaeological resource.”

ACTION ITEM: Staff will work with “sister agencies” to try to develop operational definitions for architectural and archaeological resources.

- The concept is one of addressing the viewshed impacts of a project or disturbance zone.
- A question was raised about confusion on when VMRC had permit authority and over what types of structures. The question of when and what types of structures are considered fully submerged or partially submerged was also raised.

ACTION ITEM: Staff will work on language to clarify the distinction between submerged and partially submerged resources and when VMRC permitting authority is the governing authority and when the requirements of the Offshore Energy PBR take precedence.

- **B.3. Archaeological Survey** – The proposal is to include relationship to the VMRC permitting authority and would read: *“For offshore wind energy projects, if the project requires permitting by the Virginia Marine Resources Commission under [citation] state-*

owned bottomlands are excluded from this requirement, but may be considered under other provisions of law.”

- A question was raised as to whether the phrase “but may be considered under other provisions of law” could legally be included as part of this PBR. A RAP member asked that it be excluded.
- It was noted that there may be other survey requirements mandated/required under the authority of VMRC and/or the Army Corps of Engineers.
- It was suggested that the wording of this requirement needed to be “word-smithed.”
- It was noted that the wording of this requirement tries to exclude what VMRC covers but tries to include the “Newport News” situation.

CONSENSUS: The members of the RAP agreed with the concept identified in B.3 and the need to exclude those areas under VMRC’s permitting authority.

- **B.4. Historic resources report** – Lines 80 and 81 of this section should refer to “subdivisions 1 through 3 of this subsection” instead of “subdivisions 1 through 4 of this subsection.” Staff will make this correction.

CONSENSUS/ACTION ITEM: The correction to section B.4 to correctly identify the subdivision numbers was agreed to. Staff will make the needed correction.

- It was noted that the rest of the language of the Historic Resource PBR provisions are unchanged from that included in the currently-proposed PBR being reviewed.

CONSENSUS: Members of the RAP agreed that the language contained in 9VAC15-40-50.B and 9VAC15-40-60.A and C is appropriate as written and should remain the same as that being currently reviewed under the (Onshore) Wind Energy PBR.

5. Introduction of “Straw Man” Wildlife PBR Provisions (Ray Fernald – DGIF):

Ray Fernald with the Virginia Department of Game and Inland Fisheries provided an introduction of the Wildlife PBR Provisions “Straw Man.” His introduction included the following:

- The DGIF “strawman” provisions for additions to or modifications of the (Land-based) Wind PBR proposal are presented for consideration today specifically to address coastal wildlife issues deferred by the previous RAP to these discussions, as well as issues for projects in state waters.
- The intent is to determine through today’s discussions which of these provisions or others need to be included in the proposed PBR language.
- It was noted that birds should be identified as those of local, regional and continental importance, and the RAP may want to consider different treatment of these categories.
- These proposed revisions:
 - Need to be looked at from the context of the draft PBR determining what is essential (looking at additive text not taking something away from the current proposed draft); also need to look at the aspects of wind development on-land or on-water that needs

- to deal with Birds in the Coastal Zone that were not addressed in the previous RAP.
 - The intent is to look at some issues from the first RAP that were not fully addressed by consensus; we are not trying to revisit or address issues that were handled and agreed to by the previous RAP.
 - Only address additional measures; they don't replace provisions of the previous draft.
 - Also include examples and/or references that were included in the previous draft or are known resources. The RAP needs to help determine whether those references/examples are appropriate to include in these provisions.
 - Attempts to deal with the VMRC/DEQ jurisdictional issue. Marine mammals and sea turtles are handled by VMRC when they are in the water and are not covered by this PBR in those instances.
- Marine and fishery resources are handled through VMRC.
- **Section 10: Definitions** - A new definition is proposed: "Coastal Avian Protection Zone" means all lands and state waters within 10 miles of the shoreline of the Atlantic Ocean or Chesapeake Bay, including the Eastern Shore of Virginia and open waters of the Chesapeake Bay. – This definition is intended to describe the general area of coastal habitats, including open water, that are of particular significance and concern regarding seasonal or migratory use by birds along the Atlantic Coast, including the Chesapeake Bay, the lower reaches of tidal rivers, and the Eastern Shore of Virginia, without including the entire Coastal Zone of Virginia as defined in Code for Tidewater Virginia.
- The first RAP looked at birds that were listed as T&E and as Raptors. The zone along the coast is an area of heightened concern and significance related to impacts to birds (especially migratory birds) in addition to those listed as T&E.
- This was an attempt to define that corridor of heightened concern along the coast.
- It was noted that the state does not have authority beyond the 3 mile limit.
- It was suggested that instead of a new definition, that the PBR could refer to impacts "in state waters" and within the Virginia Coastal Zone which is already defined in Code.
- **Section 40: Analysis of the beneficial and adverse impacts on natural resources** – The proposed revisions include the designation of a section to address "Analysis of coastal avian resources" which would utilize desktop surveys and maps of coastal avian migration corridors and seasonal use areas (i.e., known resources) to determine those impacts. In addition, the phrase "and Virginia Waters of Local-, Regional-, or Continental-Importance to Birds" is being proposed to be added to this section. DGIF also proposes that a subsection be added to clarify that in those cases where the desktop analyses prescribed in 5 (a) of this subsection indicates the presence of essential wildlife habitats, Important Bird Areas, migratory songbird stopover habitat, or Virginia Waters of Local-, Regional-, or Continental-Importance to Birds within or adjacent to the site that an additional field study is to be conducted.
- The Virginia Waters of Local-, Regional, or Continental-Importance to Birds is an effort to define those areas over water where birds could be a particular factor. Seasonal use areas would include more than just migratory pathway corridors. The concept of seasonal use areas was added based on the discussions of the original RAP to include Coastal GEMS in the database analysis.
- It was noted that the additional language proposed for 5 (b) tracks other similar language from other sections of the PBR. The proposed language provides for new field studies to be

conducted as appropriate and as based on the determinations made through existing field studies and databases. These new field studies are analogous to the breeding bird surveys conducted for inland land-based projects, but they regard the project site rather than the Disturbance Zone. Bird migration, seasonal and daily movements, and foraging or staging areas are of great significance in addition to the breeding sites.

- **Section 50. Determination of likely significant impacts** – This section identifies those “triggers” that will be used by the department to find “significant adverse impacts” to wildlife are likely. The proposal is that in addition to the “bat” and the state-listed T&E wildlife triggers proposed in the original PBR, an additional trigger for “state-listed sea turtle nesting areas” be added. This addition to A.2 would read “...or state-listed sea turtle nesting has been documented within the project site or on the adjacent contiguous beach.”
- Sea turtles are federally designated as T&E. Light can impact them and their nesting habits. Have to consider a multitude of possible impacts including the impacts of light and movement outside of the actual disturbance zone. There are not a lot of sea turtle nesting areas in Virginia but there are some. These areas are already mapped and would not require additional field studies or surveys; existing databases and desktop analyses would capture those areas of concern.
- An additional trigger (A.3) is proposed that would require the department to find that “significant adverse impacts to wildlife are likely to occur” when “the project is sited within the Coastal Avian Protection Zone and within or adjacent to an areas identified in Coastal GEMS or VAFWIS as an essential wildlife habitat; Important Bird Area; migratory songbird stopover habitat; avian migration or seasonal use area; or Virginia Waters of Local-, Regional-, or Continental-Importance to Birds.”
- It was noted that these proposed additions were consistent with the discussions of the original RAP and with the recently finalized federal Wind Turbine Guidelines Advisory Committee Recommendations (USFWS 2010). These federal guidelines provide four (Tier 1) preliminary “litmus tests” for preliminary evaluation of potential sites. These include:
 - Are there species of concern present on the proposed site, or is the habitat (including designated critical habitat) present for these species?
 - Does the landscape contain areas where development is precluded by law or areas designated as sensitive according to scientifically credible information? Examples of designated areas include, but are not limited to: “areas of scientific importance”; “areas of significant value”; federally designated critical habitat; high-priority conservation areas for non-government organizations (NGOs); or other local, state, regional, federal, tribal, or international categorizations.
 - Are there known critical areas of wildlife congregation, including, but not limited to: maternity roosts, hibernacula, staging areas, winter ranges, nesting sites, migration stopovers or corridors, leks, or other areas of seasonal importance?
 - Are there large areas of intact habitat with the potential for fragmentation, with respect to species of habitat fragmentation concern needing large contiguous blocks of habitat?
- At the landscape level, the Eastern Shore, Chesapeake Bay, and adjacent near shore waters clearly meet at least three of these four criteria. The USFWS Guidelines recommend that “A ‘YES’ answer to one or more of the Tier 1 questions indicates a higher probability of significant adverse impacts to wildlife.”
- **Section 60: Mitigation Plan** –

- It was suggested that a need for a mitigation plan for wildlife would be automatically triggered if a project was in an area of coastal; near shore; or state waters. There is a need to define what those areas are.

The RAP discussed the concept of these areas that are sensitive enough for birds that they should trigger the necessity for a mitigation plan.

ACTION ITEM: Staff will work with sister agencies and other experts to develop a working definition or clarification of the exact coastal and near shore areas that would trigger the need for a mitigation plan.

- The goal is to identify mitigation measures that are both feasible and reasonable.
- The DGIF proposal does not propose to change either B.1 or B.2 from the version currently out for review.
- **The DGIF proposal does suggest additional language to address the mitigation of impacts to bird populations 60.B.3:** *“For impacts to bird populations or essential habitats within the Coastal Avian Protection Zone, the applicant shall take all reasonable measures to avoid significant adverse impacts, or shall demonstrate in the mitigation plan what significant adverse impacts cannot practicably be avoided, and why additional proposed actions are reasonable. Mitigatory measures may include, but are not limited to: micro-siting adjustments (adjusting turbine locations within the disturbance zone; adjustments to facility operations (curtailment on a temporal or meteorological basis to coincide with peak bird movement/migration across the disturbance zone; seasonal restrictions or conditions regarding land clearing, construction, or maintenance activities to protect nesting birds; logistical or financial support of scientific research investigating the efficacy and cost-effectiveness of project design, construction, or operational mitigation strategies to reduce project impacts on birds and their essential coastal habitats; contribution to a fund designated for bird habitat protection and management within the Coastal Avian Protection Zone.*
- Concerns were voiced that there was currently no proven technique for curtailment that will reduce bird fatalities. There is no evidence that curtailment works for birds. Curtailment is a big question.
- It was noted that some of this proposed language may end up in guidance.
- **The DGIF proposal does suggest additional language to address the mitigation of impacts to nesting sea turtles 60.B.4:** *“For impacts to nesting sea turtles within the Coastal Avian Protection Zone, the applicant shall take all reasonable measures to avoid significant adverse impacts, or shall demonstrate in the mitigation plan what significant adverse impacts cannot be practicably be avoided, and why additional proposed actions are reasonable. Mitigatory measures may include, but are not limited to: construction within likely sea turtle crawl or nesting habitats should be avoided if possible during the turtle nesting and hatching season (May 20-October 31). If that is not possible, daily crawl surveys of the disturbance zone and of the adjacent contiguous beach shall be conducted between sunrise and 9 AM by qualified individual who have the ability to accurately distinguish between nesting and non-nesting emergencies; If construction is scheduled during the nesting season, the mitigation plan shall include measures to protect nests and hatchlings found within the survey zone; Nighttime construction during the nesting season*

should be minimized, and project lighting during construction and operation should be designed to minimize impacts upon nesting sea turtles and hatchlings; DGIF and the Sea Turtle Stranding Response Program should be notified prior to delivery of construction materials or equipment to the site from the ocean via barges, landing crafts or other large vessel.” DGIF noted that these were taken out of standard protocols developed to address stranding of sea turtles. It was noted that some of this language may end up in guidance instead of in the body of the PBR. The location of sea turtle nesting areas are known so they can be obtained through desk top surveys without requiring new surveys. DGIF noted that they don’t anticipate much impact to nesting areas but there is always a possibility depending on location.

- It was suggested that the requirements for post-construction monitoring needed to be further examined.

6. RAP Discussions of “Straw Man” Wildlife Provisions for Near shore - Analysis, Determination of Significant Impacts, Mitigation (Carol Wampler and members of the RAP):

The members of the RAP continued their discussions of the “straw man” wildlife provisions for near shore (i.e., in state waters). Carol Wampler suggested that the group should go through the proposal provided by DGIF and identify the issues and what needs to be refined and what we agree with. These discussions included the following:

- Ray Fernald with DGIF noted that after discussions and further consideration the proposed new term and definition for “Coastal Avian Protection Zone” might not be needed. He provided examples of options that could be used instead (i.e., use the term and definition of Virginia Coastal Zone that is currently in Code or specifically name the localities (counties) that would fall into the 3-mile zone).
- It was noted that the Coastal GEMS system identification of “essential wildlife habitat areas” speaks to the suitability of an area to support a given species of concern but does not speak to actual occurrences of that species of concern. A question was raised as to what happens to the wildlife trigger when there are no species of concern in the area?
- Ray Fernald provided an example of the current mapping resources available that identify important bird areas. He noted that these areas are designated through the National Audubon Society. These areas are recognized areas of significant importance to birds. It was noted that there was information also available for important bird areas in the coastal plan. These national criteria contained both global and local designation of areas of importance to birds.
- Ray Fernald also noted that there is a Migratory Song Bird Stop Over Database that was also available.
- It was noted that there is also mapping and information on migratory paths; migratory traps; bands of really high use; and fall-out area designations (where birds settle out for stops during migration, etc.).
- Ray Fernald also provided an overview of the map of state-owned bottomland and bird distributions that was developed for VMRC. He noted that there was only one study available and that the map for VMRC had been compiled using best professional judgment.
- It was noted that the near shore area has the highest volume of bird use. The mouth of the Chesapeake Bay is also a gathering place for aquatic birds.

- Item 5.a Analysis of coastal avian resources/desktop surveys: The suggestion was made that a better map of the critical areas of concern should be developed. The language of this section should direct the applicant to a particular place for the information to identify and address the areas of concern from the land side and from the open water side.
- It was suggested that all of the multiple databases that have been discussed (i.e., essential wildlife habitat; important bird areas; migratory song bird stop over areas, etc.) should be merged into one information resource or one source with multiple data layers that could be made available to the applicant.
- The source of information needs to be clearly defined.
- A question was raised as to whether the multiple resources could be made available via a website? The original Wind RAP recommended using Coastal GEMS for the applicant's desktop coastal avian survey. Coastal GEMS is a convenient source; however, it is a database that relies on other entities to supply the information. Coastal GEMS cannot guarantee that its information is the latest developed by the contributing sources (e.g., state agencies). The draft regulation should probably refer to the original sources of the data, which these sources are responsible for updating; Coastal GEMS could be referenced in Guidance as a convenient starting point for the desktop studies.
- It was noted that there is currently no requirement for any reference to the findings of any new field studies that are performed. Are the field studies providing needed information? If not, do we need to require them?
- It was noted that DGIF's draft recommends having the desktop survey requirements be the trigger for required mitigation.
- It was noted that for ridgetop projects that an applicant knows that if there are bats, then mitigation is required. The question for this RAP is in areas where there are known to be important avian resources, are you willing to stipulate that you are going to have to do mitigation? It was suggested that refined map resources were needed in item 5.a to clearly delineate that in those areas where there are known important bird populations that mitigation is required. In those areas where it is not known and field studies are conducted, the field studies would indicate where it would be appropriate or not appropriate to require mitigation.
- It was recommended that a new map/data layer should be developed to address the concerns voiced about the analysis of impacts to coastal avian resources. This new map could use known ecological relationships to define use areas (i.e., ecological modifiers). The map should show what we know. The map should clearly identify the areas of concern. It was suggested that this would be a static map but since the regulation would be reviewed every 4 years, that it could be updated during that review cycle, or sooner if requested by sufficient members of the public. It was noted that databases are updated as needed in the normal course of business, so perhaps the map could be updated as new data are made available. It was recommended that the relevant "map" should be the one available at the time of application, and not subsequently-updated versions. The applicant could then determine from the areas identified on the map whether he had to conduct additional field studies or whether his project was in an area where he had to go directly to mitigation. If the project area was identified as a Category B site (areas without extensive studies but where the desktop analysis (map) shows the presence of essential wildlife habitats, Important Bird Areas, migratory songbird stopover habitat, or Virginia Waters of Local-, Regional-, or Continental-Importance to Birds) the applicant would be required to conduct surveys to

determine the relative abundance of species likely to move through the general vicinity of the disturbance zone. Category A are areas where there is adequate available data to indicate that mitigation should be required. Category B would indicate those areas where more information was needed.

- It was suggested that these sections should be rewritten to take into consideration the development of this multiple data-layer map showing these two areas and the different requirements of each.
- The RAP members discussed the issue of providing specific location information through this multi-layer map and the possible impact on siting of a project. It was noted that the site is already defined when the applicant comes to DEQ for a permit. Siting is a matter for local governments or perhaps VMRC, depending on location. DEQ's authority is over the location of turbines within the approved site through the requirements of the mitigation plan.
- An issue was raised regarding the definition of "coastal zone." If a definition is needed, then what should it say?
- The need to refine the wording of 5.a dealing with the analysis of coastal avian resources was reiterated.

ACTION ITEM: DGIF and Bryan Watts were asked to refine the wording of the requirements of the analysis of coastal avian resources and to produce a map or multiple data layer map to use in this analysis.

- It was suggested that the term of concern should be "Coastal Zone of Virginia" (aka Tidewater Virginia) since that is already defined in Code.
- The proposed requirements for sea turtle nesting were discussed.

CONSENSUS: The RAP members agree with the language and proposed mitigation trigger for sea turtle nesting proposed by DGIF.

- RAP members noted that there needed to be a definition for "adjacent contiguous beach." How far is adjacent or contiguous? It was noted that the databases for sea turtle nesting areas are such that, if you get a hit on the database search, then you are in an area that has nesting areas.
- **Section 50 A.3** was discussed and it was agreed that this section should be revised to reflect the discussions of the RAP and the development of the resource/mitigation required/more study required map. It was suggested that it should be based on the style of A.1 and A.2 and revised accordingly.
- **Section 60: Mitigation Plan: B.3:** The correction of the designation to Virginia's Coastal Zone was identified. Carol Wampler posed the question to the RAP as to whether we needed to discuss this further. Is this specific enough? She raised a question related to the inclusion of the term "essential habitat." The specific provisions of the PBR say that we are to make a determination for wildlife, NOT for habitat. Need to tie the requirements to wildlife not habitat. Need to consider removing the reference to essential habitat. It was suggested that a mitigation option could be through protecting habitat, even though impact to habitat (as opposed to impact on wildlife) could not be the basis of requiring a mitigation plan. It was suggested that the language be revised to specify "impacts to birds" only. It was

- suggested that the language in 60.B.3 should mirror that used in 60.B.1 to be consistent.
- A question was raised as to the meaning of “significant adverse impact.” It was noted that Section 50 also contains that term and that the original RAP recommended an “operational definition” of the term. Even though this term was agreed to by the original RAP, some confusion was noted over how one would guide the decision makers on interpreting this phrase. It was noted that this would entail an exchange of information between the applicant and DEQ and discussions by DEQ with the sister agencies to identify the impacts, the significant adverse impacts. The burden is on the applicant to take “all reasonable measures to avoid significant adverse impacts.” If the impacts can’t be avoided, it is the applicant’s responsibility to demonstrate that in the mitigation plan.
 - Carol Wampler asked the members a series of questions related to this section that need to be answered before the next meeting:
 - Can you live with the requirements spelled out in 60.B.3 related to required mitigation?
 - Are you comfortable with moving the bullet points for 60.B.3 identified by DGIF to specify what mitigatory measures may include being moved into Guidance? It was suggested that the “adjustments to facility operations (curtailment)” option be removed. It was noted that this is not a effective option to consider. There is no current evidence that curtailment is a benefit to birds. It was noted that if it was included as one of the possible options in Guidance that the burden would be on the applicant to demonstrate that it was effective and a viable option. It was suggested that curtailment could be included as a research option under the logistical or financial support bullet. It was noted that monitoring for birds and bats is a viable research option. Questions were raised about the option to pay into a fund. This needs to be clarified to designate what types of funds are available when choosing this option.
 - Carol noted that what DEQ can and should enforce is one appropriate criterion for determining what goes into a regulation. The original RAP agreed on this principle. Things that are subject to change, describe “how to” rather than “what,” are advisory rather than mandatory, and/or are not intended to be enforced should generally go into Guidance, and not in the regulation itself.
 - The mitigation hierarchy is “avoid”; “minimize”; and “offset”. Effective mitigation for bird impacts in the coastal areas is a real challenge to all of us. Once a site is developed (an applicant sites a facility chiefly via local government approvals) in a sensitive coastal or near shore location, we are concerned that there will be adverse impacts to birds that operational mitigation cannot diminish.
 - It was suggested that contributing to research might be an option instead of contributions to a fund. Need to clarify how this option would be handled.
 - It was suggested that funding land conservation should also be part of the options toolbox.
 - The DGIF proposed provisions for sea turtles were discussed. DGIF noted that this is the way that impacts to nesting sea turtles are handled, and all of the indicated bullets should be included in the regulation and NOT relegated to guidance. These requirements will help the applicant not to violate other laws.

CONSENSUS: The RAP members agreed that all of the sea-turtle nesting bulleted items would be part of the regulation.

- A question was raised as to the distinction between “disturbance zone” and “survey zone” for the nesting sea turtle requirements. It was noted that the survey zone would be an area including the “disturbance zone” as well as an area outside of that zone. It was suggested that the “survey zone” might extend for ½ mile outside of the disturbance zone but would likely have to be addressed on a case-by-case basis.

ACTION ITEM: DGIF and others will work on how to define these nesting turtle “survey zones” in the regulation or Guidance.

- The need to identify and define what was meant by “adjacent contiguous beach” when addressing nesting sea turtle survey zone requirements was raised.

ACTION ITEM: DGIF and others will work on a definition of “adjacent contiguous beach.”

- It was suggested that the phrase in 60.B.4 (line 196-197) should be “Mitigation shall include the following measures, unless other measures are shown by the applicant to be at least as effective:”

ACTION ITEM: DEQ staff will work on revising the sentence above.

The facilitator asked the RAP to examine other mitigation and post-construction monitoring provisions in the currently-proposed Wind PBR. Although DGIF’s proposal includes retaining these provisions, not all of them may be workable or appropriate, especially for projects in state waters. For instance, a carcass search in state waters may be impracticable.

ACTION ITEM: DGIF and other experts will examine currently-proposed mitigation and post-construction monitoring provisions and assess what changes might need to be made for projects in state waters. Any suggested changes will be discussed by the RAP.

7. AGENDA ITEM: Possible Logistics for Moving Offshore/Coastal Wind RAP’s Recommendations Forward – Cindy Berndt, DEQ; Carol Wampler, discussion facilitator

Background: In the summer of 2009, DEQ Director David Paylor and VMRC Commissioner Steve Bowman concluded that DEQ’s original Wind RAP should not attempt to consider provisions affecting wind projects in state waters until after VMRC completed its SD 10 lease-feasibility study in March 2010. This decision was consistent with informal legal advice from the Office of the Attorney General.

Members of the original Wind RAP first noticed studies being reported from the Atlantic City coastal wind project concerning coastal avian impacts in mid-December 2009, near the end of that RAP’s deliberations. The Wind RAP did not have sufficient time to consider coastal avian impacts fully in the time allotted for developing the currently-proposed Wind PBR. Coastal avian issues and all resource issues pertaining to projects in state waters were reserved for consideration by the Offshore/Coastal Wind RAP. The understanding was that the work of the Offshore/Coastal Wind RAP, as approved by the DEQ Director and pursuant to the APA, would ultimately become part of the currently-proposed

Wind PBR.

In July 2010, Director Paylor and Commissioner Bowman determined (with the benefit of informal legal analysis by the Office of the Attorney General) the appropriate manner in which VMRC's permit law and DEQ's renewable energy PBR law should work together. That is, it was determined that a DEQ PBR would not be necessary for marine and fisheries wildlife, or for archaeological historic resources, because VMRC must address these issues pursuant to its laws. Director David Paylor directed DEQ's Offshore/Coastal Wind RAP to consider provisions that might be necessary to address birds, bats, and architectural historic resources (viewsheds) for wind projects in state waters. With the focus of the RAP thus narrowed, there were now fewer issues for RAP members to consider and resolve.

Based on today's RAP discussions, it appears that consensus on the issues may be possible in the near future -- perhaps before the public comment period for the currently-proposed Wind PBR closes on August 20, 2010.

Against this backdrop, Cindy Berndt described for the RAP a number of possible procedures by which the Offshore/Coastal RAP's recommendations (especially if they are consensus recommendations) might become part of the currently-proposed Wind PBR. The pro's and con's of the various procedures were discussed by the RAP. The goal for all parties is for the complete Wind PBR to become final and effective by the January 1, 2011, statutory deadline.

After discussion, the Offshore/Coastal Wind RAP unanimously supported the following procedure by which the RAP's recommendations may be submitted as public comments on the currently-proposed Wind PBR and become part of the subsequent APA procedures, with the hoped-for result that all wind provisions can be final and effective by January 1, 2011:

DEQ staff will develop a plan to incorporate the offshore/coastal provisions into the current proposed Wind PBR when it is presented to the DEQ Director for final adoption. DEQ will review the comments submitted on the current Wind PBR, including the comments from the Offshore/Coastal RAP, and develop a final regulation for the DEQ Director's consideration. We will then release the draft final proposal for a 30-day public comment period. Notice of the public comment period will be sent to anyone who commented on the current proposed wind PBR, anyone who commented on the notice of intent to adopt an offshore/coastal wind PBR, our interested parties lists, all registered users of the Town Hall and those persons on the regulation development mailing list. After the 30-day comment period, staff will review the comments and develop a final regulation for the DEQ Director's consideration.

Cindy Berndt noted that adding the offshore/coastal language would be a change with substantive impact under the Administrative Process Act, which would mean that interested persons could request a comment period on the changes with substantive impact, thereby causing suspension of the effective date. In addition, she noted (1) that having the unofficial comment period would not eliminate the need to suspend the effective date of the regulation should DEQ receive requests from 25 persons for a comment period on the changes to the regulation and (2) if DEQ receives the 25 requests, the effective date would be suspended and neither the onshore nor offshore/coastal components of the regulation could be effective on January 1, 2011.

With these caveats in mind, the RAP still agreed that the foregoing plan should be implemented. Since having consensus from the RAP is vital to the success of this plan, the RAP agreed to hold a Work Session prior to the already-scheduled RAP meeting on August 17, 2010. The purpose of the RAP Work Session will be to work on drafting and refining proposed historic-resources and wildlife provisions. No substantive decisions will be made at the RAP Work Session, so attendance by a quorum of the RAP is not necessary. Staff will send out a Doodle survey as soon as possible to select a date. The Work Session will be noticed to the public, and everyone is welcome to attend. Working on proposed language at the Work Session should help facilitate the RAP's ability to reach decisions at the RAP meeting on August 17.

ACTION ITEM: DEQ staff will schedule and publicly-notice a RAP Work Session early in the week of August 9 at which draft PBR provisions will be refined for consideration by the RAP at its August 17 meeting.

Other options discussed by the RAP (but not endorsed) included the following two:

- An official option/mechanism (has not been put before the Director yet) would be to adopt and suspend. These actions would be done concurrently. The recommendations of the RAP could be incorporated and then the Director could adopt the changes as Final and immediately Suspend and then send it back out for official public comment. Then a new regulatory action would be taken and then submitted for Executive Review. Under this scenario, we will not be able to meet the January 1st deadline.
- If the Offshore/Coastal RAP cannot or does not submit its recommendations as part of the public comment on the currently-proposed Wind PBR, then that PBR could continue to move through the remaining APA steps without the specific offshore/coastal provisions. Once the currently-proposed Wind PBR becomes final, then the offshore/coastal provisions could be proposed through a new regulatory action as amendments to that Wind PBR. The original Wind PBR would thus have a good chance of becoming final and effective by the January 1 deadline, but the offshore/coastal portions would not. It was noted that, for some folks, it is important to have the original PBR become final as soon as possible to accommodate land-based projects that are already being considered. If projects in state waters were to be proposed before the offshore/coastal provisions became effective, then it is likely that the existing Wind PBR would cover them – the proposed regulation is not worded in such a way as to exclude projects in state waters. If VMRC were to issue both a lease and a permit for such projects, the OAG's informal advice would lead us to believe that all the state-waters issues now being considered by the Offshore/Coastal RAP could be addressed by VMRC. The OAG would have to confirm this supposition.

In response to discussions earlier in the day, Bryan Watts and DGIF staff agreed to meet as soon as possible to develop the maps and other scientific information needed for drafting coastal/near shore avian provisions. The group expressed their appreciation for this effort. Dr. Watts and DGIF staff will forward their work product to Carol Wampler for distribution to the RAP, hopefully prior to the upcoming RAP Work Session. Laura McKay offered GIS-mapping technical assistance from her staff member, Nick Meade.

ACTION ITEM: Bryan Watts and DGIF scientists will meet to develop maps and other data

to guide and support revised PBR provisions relating to birds in coastal areas and state waters.

8. Meeting Wrap-Up/Flip Chart Notes

- Need to develop new language and a new map in about a week.
- A work session is needed to hammer out language.
- A full meeting of the RAP would be held on August 17th.
- The length of text that the group would have to agree to would be shorter than that reviewed today.
- Need to be finished at the August 17th deadline so that we can try to meet the August 20th close of comment period to try to meet the deadline to use the informal options described by Cindy.
- Flip Chart Notes Concerning Remaining Issues Included:
 - a. Consensus – means “Can live with; won’t oppose.”
 - b. Analysis (Desktop – Field Studies) -- Determination of Adverse Impacts – If so (Trigger) – Mitigation (& post-construction monitoring)
 - c. Definition of coastal area (needed? If so, what?)
 - d. Analysis – 5.a – desktop and field studies – Bryan et al. to develop in a week
 - e. Analysis – 5.b – field studies (revised on the basis of new 5.a)
 - f. Category A – existing studies indicate that mitigation should be required
 - g. Category B – new field studies needed to determine mitigation question
 - h. Determination – T&E; sea turtle nesting – need definition of “adjacent contiguous beach”
 - i. Determination – birds – based on number 1 and 2
 - j. Mitigation – birds – context? – definition of “survey”
 - k. Mitigation – sea turtle nesting
 - l. Post-construction monitoring

9. AGENDA ITEM: Public Forum

None. No member of the public signed up or requested to speak to the RAP.

10. AGENDA ITEM: Adjournment

The facilitator thanked everyone. The meeting adjourned until the RAP Work Session (to be scheduled and announced for sometime during the week beginning August 9). The next formal Offshore RAP meeting will be held at 9:30 a.m. on Tuesday, August 17, at DEQ’s Central Office (2nd floor), 629 E. Main Street, downtown Richmond.